STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

FutureGen Industrial Alliance, Inc.	:	
	:	
Application for a Certificate Authorizing the Construction and Operation of a Carbon Dioxide Pipeline.	:	13-0252

REPLY BRIEF AND MOTION TO STRIKE PORTIONS OF FUTUREGEN'S INITIAL BRIEF OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

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OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

The Staff of the Illinois Commerce Commission ("Staff"), by and through its counsel, and pursuant to Sections 200.800 and 200.190 of the Illinois Commerce Commission's ("Commission" or "ICC") Rules of Practice (83 Ill. Adm. Code 200.800 and 200.190), respectfully submits this Reply Brief and Motion to Strike portions of the Initial Brief ("IB") filed by Petitioner in the above-captioned matter.

I. Reply Brief

In its IB, FutureGen Industrial Alliance, Inc. ("FutureGen") attempts to raise arguments relating to settlement discussions as to language to be used in a hoped-for Joint Proposed Draft Order. As discussed with the Administrative Law Judge ("ALJ"), the parties agreed an unforeseen legal issue had arisen during the course of those negotiations, and the ALJ set a briefing schedule for the parties to (1) present their arguments in Initial Briefs; and (2) respond to the arguments of the other party in Reply Briefs. Staff will be responding to FutureGen's arguments, but notes that Staff believes the ALJ should strike much of FutureGen's IB; Staff makes that argument below.

FutureGen argues (1) Staff's position contradicts the plain meaning of the Carbon Dioxide Transportation and Sequestration Act ("CO_2 Act"); (2) Staff's proposal is contrary to the Legislative history of the CO_2 Act; (3) Staff's proposal would lead to impractical and unworkable results; and (4) Staff's proposed language is inconsistent with the Clean Coal FutureGen for Illinois Act of 2011. Staff will address each of these arguments in turn.

A. Staff's Position is Supported by the Plain Meaning of the CO_2 Act

First, FutureGen is correct in considering the plain meaning of the CO_2 Act. The ALJ should also consider the plain meaning of the CO_2 Act as the threshold issue. The primary rule of statutory construction is to give effect to the legislature's intent in enacting the statute. (*Bruso by Bruso v. Alexian Brothers Hospital*, 178 Ill. 2d 445, 451 (1997).) Legislative intent should be sought primarily from the language of the statute, (*People v. Beam*, 55 Ill. App. 3d 943, 946; 370 N.E. 2d 857 (5th Dist. 1977)), since the language of the statute is the best evidence of legislative intent (*Bruso*, 178 Ill. 2d at 451) and provides the best means of deciphering it. (*Matsuda*, 178 Ill. 2d at 365.) Statutes must be construed as a whole, and the court or tribunal must consider each part or section in connection with the remainder of the statute. (*Bruso* at 451-52.) If the legislature's intent can be determined from the plain language of the statute, that intent must be given effect, without further resort to other aids to statutory construction. (*Id.* at 452.) Thus, the threshold task for a court or tribunal in construing a statute is to examine the terms of the statute. (*Toys "R" Us v. Adelman*, 215 Ill. App. 3d 561, 568; 574 N.E. 2d 1328 (3rd Dist. 1991).)

FutureGen errs, however, in its reading of the CO_2 Act. FutureGen argues that the CO_2 Act "contemplates that the Commission will issue a 'final order' approving a certificate of authority ***before*** an applicant obtains 'all required permits or approvals.'" (FutureGen IB at 4 (emphasis in original).) The CO_2 Act states:

> A final order of the Commission granting a certificate of authority pursuant to this Act shall be conditioned upon the applicant obtaining all required permits or approvals . . . necessary for the construction and operation of the pipeline prior to the start of any construction.

220 ILCS 75/20(g). The General Assembly certainly contemplated that the Commission would issue a final order before all the required permits and approval were obtained, but it also contemplated that the certificate of authority would not be effective until after the applicant obtained all required permits and approvals. *See* 220 ILCS 75/1 et seq. This is clear from two separate sections of the CO_2 Act.

First, Section 20(g) states, in relevant part, that the "granting of a certificate of authority pursuant to this Act shall be conditioned upon the applicant obtaining all required permits or approvals." 220 ILCS 75/20(g). The plain meaning of this section is clear: the granting of the certificate is conditioned upon the applicant obtaining all required permits or approvals. FutureGen's argument that the final order itself should be conditioned upon the applicant obtaining all required permits or approvals ignores the very plain meaning of the statute and the General Assembly's deliberate wordsmithing. (*See* FutureGen IB at 4-5.) If the General Assembly had wished the Commission to issue a "final order conditioned upon the applicant obtaining all required merits or approvals," it could have chosen its words to indicate that. However, the General Assembly chose not to do so; the conditions are attached to the certificate of authority itself, not the Commission's final order. *See* 220 ILCS 75/20(g).

Second, Section 20(b) grants the Commission the authority to grant a certificate of authority pursuant to the CO_2 Act "if it makes a specific written finding as to each of the following . . . (7) the applicant possesses the financial, managerial, legal, and technical qualifications necessary to construct and operate the proposed pipeline." 220 ILCS 75/20(b). In other words, the Commission's authority to grant a certificate is only to be exercised if the applicant has, among other things, demonstrated it possesses the legal qualifications necessary to *construct* and *operate* the proposed pipeline. *Id.* The legal qualifications necessary to construct and operate the proposed pipeline include the required permits and approvals to do so.

It appears the General Assembly recognized that the Commission process, limited to eleven months from the date of filing, may be faster than the application process for some or all of the other required permits and approvals, and thus allowed the Commission to issue a final order that would grant a certificate of authority that would take force and become effective upon the applicant obtaining all required permits and approvals. *See* 220 ILCS 75/1 et seq. Contrary to FutureGen's assertions, this allows the Commission to make a final decision on the application for a certificate of authority before the applicant has obtained all required permits and approvals. (*See* FutureGen IB at 5-6.) Under Staff's interpretation, the Commission may not issue a certificate of authority until, but may decide it will issue a certificate of authority upon, the date the successful applicant fulfills all the qualifications required by the CO2 Act, including obtaining all the required permits and approvals.

B. The Plain Meaning of the CO_2 Act is Clear, and the Commission should not Consider the Legislative History of the CO_2 Act

FutureGen attempts to look to the Legislative history of the CO_2 Act to argue against Staff's position. (FutureGen IB at 6-7.) However, the plain meaning of the CO_2 Act is clear, and if the plain meaning of the statute is clear, the Commission may not consider the Legislative history – an extrinsic aid to construction - in interpreting the statute. (*People v. Glisson*, 202 Ill. 2d 499, 505 (2002) ("Only where the language of the statute is ambiguous may the court resort to other aids of statutory construction."); *Paciga v. Property Tax Appeal Bd.*, 322 Ill. App. 3d 157, 161 (2001) ("A statute is ambiguous if it is capable of two *reasonable* and conflicting interpretations.") (emphasis added).)

Importantly, the CO_2 Act allows for only one reasonable interpretation on this issue. FutureGen's interpretation is unreasonable, as it would allow any applicant to obtain a certificate of authority from the Commission after merely applying for it despite not having met all the requirements, including all required permits and approvals, to obtain the certificate. (*See, generally,* FutureGen IB.) This would render the Commission certification process, the certificate of authority itself, and, indeed, the entire CO_2 Act meaningless. "Where the language of a statute admits of two constructions, one of which would make the enactment absurd and illogical, while the other renders it reasonable and sensible, the construction which leads to an absurd result must be avoided." (*Mulligan v. Joliet Regional Port District*, 527 N.E.2d 1264, 1269 (1988).) The result of FutureGen's position is unreasonable and the results it would allow are absurd and illogical, and thus, FutureGen's statutory interpretation should be avoided.

C. Staff's Interpretation of the CO_2 Act Does Not Lead to Impractical or Unworkable Results

Third, FutureGen argues Staff's interpretation would lead to "impractical and unworkable results." (FutureGen IB at 7-10.) FutureGen explains Staff's interpretation is "unworkable" because it would not allow FutureGen to exercise eminent domain and condemn property until it obtained an effective certificate of authority. (FutureGen IB at 7.) Additionally, FutureGen explains Staff's interpretation is "impractical" because FutureGen may not be able to meet a statutory deadline to expend funds awarded by the U.S. Department of Energy. *Id.* at 8. As an initial matter, neither of these consequences of Staff's interpretation should sway the Commission; neither assertion of fact is supported by citation to the record, and therefore neither should be considered by the ALJ. *See* 83 Ill. Admin. Code 200.610; 83 Ill. Admin. Code 200.800(a).

Next, Staff's interpretation is not "unworkable" merely because it does not allow FutureGen to exercise eminent domain condemnation *before* its certificate of authority comes into full force and effect. "The purpose of condemnation proceedings is to satisfy constitutional and statutory requirements that property may not be taken without due process of law." (*Illinois Cities Water Co. v. City of Mt. Vernon*, 11 Ill. 2d 547, 551 (1957).) Moreover, "[t]he right of eminent domain can only be exercised where such grant [of authority] is specifically conferred by legislative enactment, and then only in the manner and by the agency so empowered." (*Forest Preserve Dist. v. City of Chicago*, 159 Ill. App. 3d 859, 861 (1987).) Pursuant to the CO_2 Act, the Legislature only granted "a limited grant of authority to take and acquire an easement in any property or interest in property for the construction, maintenance, or operation of a carbon dioxide pipeline in the manner provided for the exercise of the power of eminent domain under the

Eminent Domain Act" when a certificate of authority to construct and operate a carbon dioxide pipeline has been issued by the Commission to a person or entity. 220 ILCS 75/20(i). As discussed above, the Commission cannot issue a certificate of authority to operate a carbon dioxide pipeline until, among other things, all legal qualifications to construct and operate the proposed carbon dioxide pipeline are met by the applicant. 220 ILCS 75/20(b)(7). Staff's interpretation of the statute is not "unworkable" merely because FutureGen is prevented from prematurely exercising eminent domain authority. Rather, FutureGen's interpretation is unworkable and contrary to the constitutional property right protections granted to Illinois landowners.

FutureGen argues that its interpretation "advances the project while also protecting landowner rights. . . [because] FutureGen Alliance will make no physical changes to affected landowners' property without first obtaining all needed permits." (FutureGen IB at 8.) However, if FutureGen has exercised eminent domain authority, the landowners' property rights will have been impeded upon, no matter when or if FutureGen begins construction. Additionally, FutureGen argues its interpretation merely allows it to *begin* condemnation proceedings, somehow implying that merely *beginning* the process of condemning property is not intrusive on property owners' rights. Clearly, this is not the case. As discussed above, no party that merely applies for a certificate of authority with the Commission should be permitted, by virtue of that fact alone, to condemn Illinois property.

Second, Staff's interpretation is not "impractical" because FutureGen may not be able to meet a statutory deadline to expend funds awarded by the U.S. Department of Energy. (FutureGen IB at 8.) Staff's interpretation should not be found to be impractical

merely because of FutureGen's project funding issues. Allowing FutureGen's singular financial situation to affect the interpretation of the CO_2 Act requirements would be the practical equivalent to special legislation, which is prohibited in Illinois. ILCS Const. Art. 4, § 13 ("The General Assembly shall pass no special or local law when a general law is or can be made applicable."). The statute provides for the issuance of a certificate of authority once certain practical requirements are met, and FutureGen's unsupported factual are not indicative of the practicality of the CO_2 Act.

Moreover, it is clear that a court must construe a statute as it is, and may not supply omissions, remedy defects, or add exceptions and limitations to the statute's application, regardless of its opinion regarding the desirability of the results of the statute's operation. (*Adelman*, 215 Ill. App. 3d at 568; *cf*. *Thornton v. Mono Mfg. Co.*, 99 Ill. App. 3d 722, 425 N.E. 2d 522 (2nd Dist. 1981) (in determining that application of statute of limitations barring minor's products liability claim was proper, if perhaps harsh, court observed that, where statute is clear, only legitimate role of court is to enforce the statute as enacted by legislature); *People ex rel. Racing Bd. v. Blackhawk Racing*, 78 Ill. App. 3d 260, 397 N.E. 2d 134 (1st Dist. 1979) (court observed that, though the General Assembly could have enacted a statute more effective in accomplishing its purpose than the one it did enact, the court was not permitted to rewrite the statute to remedy this defect).)

The CO_2 Act states:

> [a] certificate of authority to construct and operate a carbon dioxide pipeline issued by the Commission shall contain and include . . . a limited grant of authority to take and acquire an easement in any property or interest in property for the construction, maintenance, or operation of a carbon dioxide pipeline in the manner provided for the exercise of the power of eminent domain under the Eminent Domain Act.

220 ILCS 75/20(i). Clearly, this authority is granted when a certificate of authority becomes effective and in force pursuant to the CO_2 Act. *See id.* It would be illogical for the General Assembly or the Commission to allow an applicant this authority without having met all the requirements to obtain the certificate of authority pursuant to the CO_2 Act. Moreover, doing so would essentially be equivalent to the Commission rewriting the statute to remedy FutureGen's perceived "defect." This should not be done.

Third, FutureGen attempts to argue Staff's interpretation would lead to unworkable or impractical results by referencing proceedings under the Federal Energy Regulatory Commission ("FERC"). (FutureGen IB at 9.) However, how FERC handles granting of certificates for public convenience and necessity is completely irrelevant to how the CO_2 Act, an Illinois statute, requires the Commission to handle the granting of a certificate of authority pursuant to the CO_2 Act. FutureGen cannot and does not raise any issue of federal preemption here. Any reference to the FERC process should be ignored as irrelevant, as facts not supported by citation to the record, or both.

D. Staff's Position is Consistent with the Requirements of the Clean Coal FutureGen for Illinois Act of 2011

Fourth, FutureGen argues that Staff's position is inconsistent with the Clean Coal FutureGen for Illinois Act of 2011. (FutureGen IB at 10.) However, as discussed above, Staff's interpretation allows the Commission to make a final decision on the application for a certificate of authority before the applicant has obtained all required permits and approvals. (*See* FutureGen IB at 5-6.) This streamlines the process and allows for the timely issuance of a final order within 11 months of the date on which the application is filed, as required by the CO_2 Act. *See* 220 ILCS 75/20(h). Furthermore, it allows

successful applicants to obtain a certificate of authority as quickly as they fulfill the requirements of the CO_2 Act. Despite FutureGen's attempts to persuade the Commission otherwise, the Commission simply cannot "streamline" the application process to the extent it would result in rendering the CO_2 Act meaningless.

Therefore, the Commission should find that a final order by the Commission should either deny a certificate of authority or grant a certificate of authority that becomes effective only after the applicant has met all the requirements of obtaining the certificate of authority, including receiving all required permits and approvals, pursuant to the CO_2 Act.

II. Motion to Strike

Although Staff addressed FutureGen's arguments above, FutureGen's attempt to represent Staff's position and address Staff's position in its IB is improper. The offending portions of FutureGen's IB should be stricken.

FutureGen's ill-advised attempt to preemptively combat what it anticipates as Staff's position is improper on many levels. First, the rules of evidence are quite clear that "evidence of the following is not admissible on behalf of any party, when offered to prove . . . invalidity of . . . conduct or statements made in compromise negotiations regarding the claim." Ill. Sup. Ct. R. 408. The Commission's rules clearly adopt the rules of evidence applied in civil cases in the circuit courts of the State of Illinois. 83 Ill. Admin. Code § 200.610(b) ("*In contested cases, and licensing proceedings, the rules of evidence and privilege applied in civil cases in the circuit courts of the State of Illinois shall be followed.*") (emphasis in original). The attempts by Staff to communicate with FutureGen as to the contested legal issue constitute conduct or statements made in

compromise negotiations regarding the issue. FutureGen is clearly attempting to offer up a representation of Staff's position in order to prove the invalidity of Staff's position. (*See, generally,* FutureGen IB.) For this reason alone, the statements and arguments related to Staff's position laid out below should be stricken from FutureGen's IB.

Second, the Commission's rules require that "[s]tatements of fact in briefs . . . should be supported by citation to the record." 83 Ill. Admin. Code § 200.800(a). Throughout its IB, FutureGen's makes representations as to Staff's purported position and arguments that are solely based on the representation of Staff's purported position; the assertion of Staff's purported position in this manner constitute statements of fact in FutureGen's IB. Each such attempt constitutes a statement of fact in brief which is unsupported by citation to the record. *See id.* Indeed, FutureGen simply cannot provide support for its assertions and counter-arguments by citation to the record because none exists. Therefore, according to the Commission's rules of practice, FutureGen should not have attempted to include these assertions of fact and each such assertion of fact and each argument based on those assertions of fact should be stricken. *See id.*

Third, any representation of Staff's position by a different party is improper. Staff is quiet capable of representing its own position, and as all parties should, enjoys representing its own positions in a manner it sees fit; not in the manner an opposing party would prefer. Finally, FutureGen has been provided the opportunity to respond to Staff's arguments in its Reply Brief; any attempts to do so prior to its Reply Brief is an improper attempt to have two bites at the apple. *See* 83 Ill. Admin. Code § 200.800(c) ("Parties and the Staff shall not raise an argument in their reply briefs that is not responsive to any argument raised in any other party's or the Staff's opening brief").

Furthermore, Staff would be unfairly prejudiced by this attempt should be it allowed to stand.

Therefore, Staff respectfully requests that any mention of Staff's purported position, and any arguments or conclusions based on Staff's purported position should be stricken. More specifically, Staff requests the following language be stricken from FutureGen's IB:

(1) On page one: "counsel for Staff has advocated for . . . including the American Recovery and Reinvestment Act's construction spending statutory deadline."

(2) On page three: "Staff objected to this language, and has instead proposed . . . all other permits and approvals necessary for the construction and operation of the pipeline prior to the start of any construction."

(3) On page four: "Unlike the language proposed by FutureGen . . . not found in the Act."

(4) On page four: "because Staff's proposed language . . . Clean Coal FutureGen for Illinois Act of 2011."

(5) On page four: the subsection title "A. Staff's Proposed Language . . . CO_2 Act."

(6) On page four, in footnote 1: "Staff has objected to the inclusion of these paragraphs."

(7) On page five: "In contrast, the language proposed by Staff . . . once all permits and approvals are."

(8) On page six: "obtained . . . Section 20(g) of the Act."

(9) On page six: the subsection title: "B. Staff's Proposed Language . . . Act."

(10) On page six: “Even if . . . proposed by Staff.”

(11) On page seven: “Staff’s proposed language . . . similarly rejected.”

(12) On page seven: the subsection title “C. Adopting the Staff’s Language . . . Results.”

(13) On page seven: “Staff’s proposed language is . . . authority.”

(14) On page eight: “Staff’s proposed language is . . . an act of Congress.”

(15) On page ten: “Ironically, the Staff’s proposed language . . . to avoid.”

(16) On page ten: the subsection title “D. Staff’s Language . . . Act of 2011.”

(17) On page ten: “Not only is the language proposed by Staff . . . as well.”

(18) On page eleven: “Staff has proposed language . . . Staff’s language should be rejected.”

Additionally, Staff respectfully requests that FutureGen’s attempt to bring in FERC procedures be stricken as irrelevant to, and outside the scope of the record of, this proceeding. FutureGen has applied for a certificate with the Illinois Commerce Commission, not FERC. (*See, generally,* FutureGen Application for Certification Authorizing Construction and Operation of a Carbon Dioxide Pipeline; FutureGen’s Motion to Amend Application for Certification to Construct and Operate A Carbon Dioxide Pipeline.) The procedures FERC may or may not have in place are neither part of the record in this proceeding, nor relevant to the procedures the Illinois Commerce Commission must follow in determining whether to issue a certificate of authority pursuant to the Illinois Carbon Dioxide Transportation and Sequestration Act. 220 ILCS 75/1 et seq. The General Assembly was quite explicit in the procedures the Commission must follow in determining whether to issue a certificate of authority pursuant to that Act,

and the Commission does not enjoy the discretion to ignore those requirements. *See id.* FutureGen's attempts to confuse the legal requirements by referring to irrelevant FERC proceedings should not be allowed to stand, and the offending language should be stricken from FutureGen's IB.

Specifically, Staff requests the following language be stricken from FutureGen's IB:

(1) On page nine: "In fact . . . only if the state and local permits follow issuance of the certificate."

III. Conclusion

WHEREFORE, Staff respectfully requests that the ALJ adopt Staff's positions as set forth herein and in Staff's IB and strike the portions of FutureGen's IB identified above.

Respectfully submitted,
__/s/_____
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